UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

--------------------------------X

HEMAD JANFESHAN,

Plaintiff,

v.

DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

--------------------------------X

16-CV-6915 (ARR)

December 29, 2016
Brooklyn, New York

TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE
BEFORE THE HONORABLE LOIS BLOOM
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: TAREK ISMAIL, ESQ.
RAMZI KASSEM, ESQ.
Main Street Legal Services, Inc.
2 Court Street
Long Island City, New York 11101

For the Defendants: ELLIOT SCHACHNER, ESQ.
U.S. Attorney's Office
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201

Court Transcriber: SHARI RIEMER, CET-805
TypeWrite Word Processing Service
211 N. Milton Road
Saratoga Springs, New York 12866

Proceedings recorded by electronic sound recording, transcript produced by transcription service

(Proceedings began at 9:32 a.m.)

THE CLERK: Civil Cause for Telephone Conference, Docket No. 16-CV-6915, Janfeshan v. DHS, et al.

Will the parties please state your names for the record.

MR. ISMAIL: This is Tarek Ismail with Ramzi Kassem here for the plaintiff Mr. Janfeshan.

MR. SCHACHNER: Elliot Schachner, Assistant United States Attorney for the defendants.

THE CLERK: The Honorable Lois Bloom presiding.

THE COURT: Good morning, Mr. Ismail. I'm sorry, was it Mr. Kassem or Ms. Ahmad that's with you?

MR. ISMAIL: Mr. Kassem. Ms. Ahmad is out of the country, Judge.

THE COURT: Good morning, Mr. Kassem.

MR. KASSEM: Good morning, Judge.

THE COURT: And good morning, Mr. Schachner. How is everybody today?

MR. SCHACHNER: Good morning, Your Honor. Just fine.

MR. ISMAIL: Great.

THE COURT: So here is where we are. I'm jumping way ahead just to get to the meat of it. This is an initial telephone conference in the new case 16-CV-6915 which relates to the seizure and the anticipated search of Mr. Janfeshan's cell phone which was detained pursuant to a lawful border search when Mr. Janfeshan entered the United States through JFK. The Government had agreed upon the filing of a request for a preliminary injunction in the prior case, 16-CV-4324, to not search this phone until this matter was resolved.

It was a bit of a convoluted procedural history. The prior action which was resolved when Mr. Janfeshan entered the United States after he was permitted to board the Air Egypt flight through quite a lot of effort on the part of both the plaintiff and the defendant. That case was resolved and even though the motion regarding the search of the cell phone was made in that case the District Judge, the Honorable Allyne Ross, directed that that case be closed and that a new case be filed which was filed under the 16-CV-6915 which has now been referred as related to Judge Ross and myself, and Judge Ross has referred any motion that would be made to my attention. So that gets us to where we are today.

There are presently two motions pending on the docket sheet. One is the motion for leave to proceed in forma pauperis filed by Mr. Janfeshan and that is granted, and I'll put that in the order that I will issue after today's conference.

And the other is a motion to amend, correct or supplement that the defendant requests that the Court issue an order allowing CBP to conduct a search or in the alternative to set a briefing schedule and hold a hearing on the matter. I quite frankly think that we should solve this issue by working through a way that they can search the phone and not search the portions that are attorney-client privilege and then we're done and that's not briefing and that's not argument. It's clear to me that the border search is permissible. The border search doctrine is an example of what is known as an administrative or special needs exception to the traditional threshold requirements of probable cause and reasonable suspicion.

But I do believe that we can balance the need to search against the invasion of the attorney-client privilege which the search may entail and I don't need briefing and motions. I need cooperation here.

So who wants to be heard, Mr. Ismail, Mr. Kassem, because I have certain things I do want to say to you.

MR. ISMAIL: Sure. I'm happy to address that, Judge, and thank you for the summary. I think that's -- we track on that. So we filed an initial motion in the previous case on -- in an emergency posture with respect to the attorney-client privilege question, and we -- and we are glad that the Government has held off on searching the phone and Your Honor and Judge Ross ordered us to file a new complaint in this motion and we did so on the 21st as Your Honor indicated.

As we looked into our client's interest as we filed that claim, and that's why it took us a little bit longer to file the complaint than we would have liked. We found that in order to protect our client's interest it was proper to file it both with respect to the attorney-client privilege issue as we had in the initial TRO and with respect to his Fourth Amendment right that he not be -- that his phone not be searched.

I understand, Your Honor, that the border search doctrine does provide for additional leave for the Government to do searches that it may otherwise not be able to do within the United States. However, there is a significant amount of case law which limits this type of search that the Government can do at the border with respect to electronics. At this point I mean in order to protect Mr. Janfeshan's interest it's not just that we're asking that the attorney-client privilege information be protected, we're also seeking that his phone be protected from an invasive search that would then potentially -- and we have no reason to believe anything would be turned up that would implicate him but --

THE COURT: Mr. Ismail, what is your authority for saying that you have the right once he presents himself at the border with an electronic device to bring a preemptive motion? What is your authority for that, sir?

MR. ISMAIL: Your Honor, beyond the -- there's no authority in the Second Circuit on the question of electronic boarder searchers. However --

THE COURT: Can I just say to you that there is a case directly on point, Abidor --

MR. ISMAIL: I know --

THE COURT: -- versus Napolitano which you did not cite. It's 990 F.Supp.2d 260, a Judge Korman case from 2013.

MR. ISMAIL: I'm aware of that case and I'm also aware of United States v. Gibo which is a more recent case out of the Eastern District which held that [inaudible] at the border was not proper. Beyond that --

THE COURT: It was in a different setting. It was in a U.S. v. Gibo which tells you a lot because again in Abidor where the plaintiff was making the pitch that there should be no search or that the regulations violated the Fourth Amendment. Judge Korman dismissed that action. When you're talking about in a criminal context for a different posture there may be a way that you can make your argument but right now you have a threatened injury, you have no real injury and you do not have in my mind a way to get equitable relief except by making an agreement with the Government that the Government was prepared to enter into but there's been no progress made because you've been in my mind getting the benefit of the Government's agreement not to search the phone until the matter is resolved in court and I am not going to let this continue because, again, looking at the emails back and forth between your team of people and Ms. Kelly you're asking that CBP return the phone immediately without conducting any search of its content. It's not happening. You don't have the right to that.

MR. ISMAIL: Your Honor, if I may just supplement the argument I was making. I'm aware of Abidor but there's additional case law and there's also been Supreme Court precedent that affects this case.

THE COURT: Tell me, what is the Supreme Court precedent that you're pointing me to?

MR. ISMAIL: So, Your Honor, I'm --

THE COURT: It certainly was not in your papers, Mr. Ismail.

MR. ISMAIL: Like I said, we are filing -- we intend to file a motion --

THE COURT: Not without my approval you're not. You already filed your motion in the other case, sir.

MR. ISMAIL: I understand, Judge, and that case I think we've resolved. So we're in a new posture.

THE COURT: No, no, no. You filed your motion for preliminary injunctive relief under the other docket number. I am not letting this go on with motion practice just to prolong that you have gotten the Government to accede to your demand that they not do any search. It was a border search.

They would agree not to search any of the things that you're going to say are governed by attorney-client privilege in this specific instance but you're trying to fight against that and I don't believe that there is a basis for you to say that they have to return the phone without conducting any search of his content. I don't believe that there is any authority for that.

MR. ISMAIL: So, Your Honor, if I can point you to the authority that I think governs here. I mean, first and foremost, I understand that the posture is unique here because it's not a criminal case and there is another case on this question out of the District of Massachusetts, House v. Napolitano, and I can give you the cite.

THE COURT: I've looked at -- but, again, Judge Korman was very clear in his decision that there was no standing to attack even as applied under the Fourth Amendment the regulations of CBP.

MR. ISMAIL: Your Honor, I mean Abidor -- the judge did determine that there was no standing but the judge's ruling on the question of whether or not there was border search authority there to search Mr. Abidor's phone doesn't hold as even persuasive authority here because it wasn't -- it doesn't -- it didn't address the issue once the standing issue was resolved.

THE COURT: Excuse me, sir. Judge Korman had a very long even if there was standing portion of this opinion. And he basically said reasonable suspicion is a minimal threshold standard for conducting a search, and I'll quote to you. "Plaintiffs must be drinking the Kool-Aid if they think that a reasonable suspicion threshold of this kind will enable them to guarantee confidentiality to their sources." In that case he was talking about a journalist or Mr. Abidor who was conducting research.

He goes into quite an analysis even if he never reached the merits because he found there was no standing and he talked about the precautions plaintiff may choose to take to mitigate the alleged harm associated with the possibility of a border search and your client I understand brought his phone in. He needed to contact counsel in case things went wrong but he could have left his real phone with his wife overseas and he could have brought a more streamlined phone back into the country but he didn't.

So we're left with that the Government has the right to conduct a border search and we have your claim that there are attorney-client privileges on the -- attorney-client privilege attached to communications on the phone and I am prepared to try to narrow or cabin their search so that it does not intrude on the attorney-client privileged communications but that's what I'm prepared to do. I'm not prepared to go on with motion practice for the next month so that the Government is unable to search the phone. I am not willing to do that, and I'm the judge that you need to convince, Mr. Ismail.

So, again, I'm not setting a new schedule. CBP has the right to search the electronic devices on people who present themselves at the border, and if you want to get a remedy for your client now is your time to start thinking about a protocol so we can get the attorney-client information on that phone segregated so that they will not open those communications. That's what you have the chance to do.

MR. KASSEM: Your Honor, this is Ramzi Kassem, if I may. In terms of discussing the attorney-client privilege aspect of what is on the phone, we've already had some exchanges with opposing counsel towards discussing some concrete ideas hopefully next week [inaudible] some exchanges [inaudible] essentially over email.

THE COURT: I'm sorry, Mr. Kassem. I didn't hear the last part. There's been some exchange of?

MR. KASSEM: There's been some exchanges off docket.

THE COURT: Off docket. I'm sorry, I didn't hear what the word was.

MR. KASSEM: Yes. Essentially we've been able to have that conversation and we'll continue to have that conversation. Hopefully we'll be talking -- we'll be discussing specifics in that regard next week with Mr.

Schachner I believe.

To go back to the --

THE COURT: Why can't we discuss those things, Mr. Kassem, now? I'm on the phone. I want this to be resolved. I don't want it to be dragged out. I have looked into this matter. So, again, I'm on the phone with you now. I see that there are emails attached to the new -- to the old motion which was filed again in 16-CV-4324. You've attached the letters between counsel, Ms. Ahmad and Ms. Kelly, and I'm specifically looking at Docket 10-2, Page 21 in 16-CV-4324, which I think is the repeat of another email where Mr. Janfeshan is not waiving the attorney-client privilege, specifically his communications via email, what's up, signal, text messaging are protected and you're saying even from a filter team and you've named Naz Ahmad. I know who that is. Who is Kelly Burnett? Who is Kelly Burnett?

MR. KASSEM: Your Honor, that is a representative of one of the defendants. Kelly Burnett was one of our former students who's on the legal team.

Your Honor, before we get into these --

THE COURT: No, no, no. I really want to get to what I wanted to get accomplished here. I don't want this dragging on.

MR. KASSEM: Your Honor -- respectfully, Your Honor, if you would give us an opportunity to address some of the points that you've raised we would appreciate it.

THE COURT: Go ahead.

MR. KASSEM: So, Your Honor, Abidor in our view -- we've also looked into this in some depth. Abidor, in our view, is dicta and is unpersuasive and there is authority that Abidor did not recognize -- there's a distinction in the case law between what is considered a manual search and what is considered a forensic search, and we would be remiss, Your Honor, as counsel for Mr. Janfeshan --

THE COURT: I'm with you. I am with you, Mr. Kassem. I understand there is something different between a manual search and a forensic search. I understand that. Believe me, part of my --

MR. KASSEM: Your Honor, we --

THE COURT: Excuse me, sir. Part of my obligation as a magistrate judge in this court is to oversee warrant applications and arrest warrants. So I understand that there are different standards that attach to different types of applications and here we are only talking about a border search and we are talking that there are differences between the quick look and them creating imaging and looking fully through either a laptop or a cell phone. I understand those distinctions.

I would tell you, however, sir, be very careful in this district to call Judge Korman's opinion dicta because I can tell you he was the U.S. Attorney in the Eastern District. He was the chief judge in this court. Judge Ross served under him as a U.S. Attorney. I was hired when he was chief judge. So he commands a lot of respect on these issues and he's a very thoughtful intellectually capable jurist. So just to waive Abidor away and say it's dicta is not going to persuade me that it's dicta. That's an academic trick if anything. You're a law professor. I'm in the court. I looked up whether or not Abidor was still good law. It is.

MR. KASSEM: Your Honor, if I may. I mean Abidor relies on the Ninth Circuit ruling in Kotterman and Judge Korman cites this idea of a quick look versus a more extensive forensic search but the court in Kotterman doesn't really mention the term quick look once but the idea in Kotterman really is to make a very substantive distinction between what the manual search which is a search where someone is looking through the phone sort of with their finger or whatever the case may be or a more in depth forensic search in which a --

THE COURT: I'm so sorry, sir. I need to cut you off because really what you don't address is more important than what you're addressing.

MR. KASSEM: What's that, Your Honor?

THE COURT: You have brought a new case saying that they don't have the right to search your client's phone and they do. It's a border search. They have the right to search the phone. If you want to make a claim for damages if they go through things and you believe that they violated his rights, I don't even think that you'd have a Bivens claim. I don't think you have a declaratory judgment action. I don't really see that you'd have a basis to bring this civil action.

So if you really want to talk about what the problem is with your case I don't think that you'd have a claim under civil rights free standing Fourth Amendment principles. You're trying to ground it in a declaratory judgment. I don't think that you have a case that you can bring against the people you're naming as defendants. I do think that we have a willingness here to work out a solution. What a beautiful thing. We could work out a solution for your client. It might not get you everything you want. They are still going to do some search whether it's a full forensic analysis or it's a quick look. That's not an issue for me.

For me the issue is your attorney-client privilege and trying to maintain that attorney-client privilege and so I would like to get back to what I had on my to-do list which was who are the people that you've named here and does the attorney-client privilege attach to each of the people you've named here because I don't know all of them. I know who Mr. Kassem is. I know who Ms. Ahmad is. I don't know if Tarek Ismail is the same person I have now. Is that you, Mr. Ismail?

MR. ISMAIL: Yes, Your Honor, that's me.

MR. KASSEM: Your Honor, I do want to -- I'm sorry to be bringing it back to this point but I really do want to clarify our position here. Our position is not that there would be no search whatsoever. The case law dictates that there would -- there is a distinction between a manual search and a forensic search --

THE COURT: So let me ask the Government. Mr. Schachner, do you know which type of search your client intends to conduct?

MR. SCHACHNER: We intend to conduct a complete search of the -- of what's in -- of what's on the phone obviously subject to the attorney-client issue which I understand is the only issue proper before the Court now.

THE COURT: Thank you.

MR. SCHACHNER: And we certainly believe we have the right to do so, the authority to do so under the Abidor decision.

THE COURT: So I do think, Mr. Ismail and Mr. Kassem, that getting an agreement as to who is going to be covered by the attorney-client privilege. So what I had suggested which I suggested when I saw the parties back in December was that you get a list from everybody who is an attorney or who the attorney-client privilege would attach to, you get the dates that the communications were made, the emails. I don't care which type of communication it was, whether it was email, what's up, signal, text. I don't care. But you would know on your side when you communicated and when he communicated and you would be able to insulate all of those communications with the Government's consent and then you would be able to move on and try to challenge this at some other point or some other time.

Let me just, Mr. Ismail and Mr. Kassem, because I did really read through all the papers and really think about the arguments. Part of what I did hear you to say is so Mr. Janfeshan made this choice to go to Yemen and this had a number of consequences for himself and his family and that's never going to change. That he decided to go to Yemen is never going to change. So that's always going to be something in his past.

What do you expect the Government to do about that?

MR. KASSEM: Well, Your Honor -- this is Ramzi Kassem. Your Honor, I do want to highlight. You asked Mr. Schachner whether they were going to conduct a manual or a forensic search. We were really interested in the answer to that question but I don't believe mr. Schachner answered the question.

THE COURT: He did. He said full search. He said full search which means a forensic search.

MR. KASSEM: So, Your Honor, we -- we have our answer then. As far as Mr. Janfeshan travel to Yemen, respectfully, Your Honor, every year there are tens of thousands if not hundreds of thousands of Americans, including Americans of Yemeni origin or Americans who have no ties to Yemen who travel to Yemen. It is not unlawful --

THE COURT: Mr. Kassem, of course it's not unlawful but there are consequences and the Government is looking at a number of different things and it's clear --

MR. KASSEM: But, Your Honor --

THE COURT: -- an itinerary can be something that they think is suggestive of wrongdoing. Whether or not it is is a different question.

MR. KASSEM: Your Honor -- respectfully, Your Honor, I believe that both you and I are speculating because at no point in these proceedings did the Government ever say on the record what the reason was --

THE COURT: They do not have to. It's a border search. They do not have to have a basis. It is a border search. He presented himself at the border. He had an electronic device. They are allowed to search that device.

MR. KASSEM: Your Honor, we -- our view based on our review of the jurisprudence is that for a forensic search they do need to have a basis and we would like to frame that issue for the Court now that it is clear that the Government intends to conduct a forensic search.

THE COURT: Look, you have your choice here. You have your choice here. Your choice is either to come up with what you believe is the attorney-client list of communications that they will agree not to open or you don't have to do that but they're going to conduct their search and you'll be left to writing your briefs and your motions after the search is conducted.

MR. KASSEM: Your Honor, we --

THE COURT: That's what your choice is at this point. If you want to argue that they don't have the right to do a full forensic search of the phone I think you're in the wrong ball park here. Your case was about whether or not there was attorney-client privilege that attached to communications on the phone and we were willing to do what we could to get that information segregated, not searched, not opened, eliminate that possibility for your client.

If what you think is going to happen is that I'm going to hold off for another four months and not let the Government search the phone because we're going to be briefing the issue of full search versus quick search, that's not going to happen. I don't care whether you call it forensic, full, mirror image, it's not going to happen. This is not the vehicle for that.

MR. KASSEM: Your Honor, if I may. If I may respond or address some of the points you're raising, Your Honor. So on the first point we were -- and I just want to make two points here, Your Honor, if I may.

The first is that we were ordered to file a motion in the new action which we are about to do. The second point is that after the attorney-client dimension of all of this, we are in conversation with the Government and we are trying to figure out what might be mutually acceptable protocol.

We cannot in fairness to our client waive the other issue. It is our duty to raise these issues --

THE COURT: What other issues? What other issues are you talking about, the exhaustive forensic search of the phone?

MR. KASSEM: That, Your Honor, the point that was made earlier that while we do not contest the defendant's authority to conduct their manual search at the border, we do believe that our client is protected against a baseless forensic search. So we can't simply waive that because it's convenient for Mr. Schachner.

What we're envisioning, Your Honor, by the way, is a two-week briefing schedule. We're not talking about four months, Your Honor.

THE COURT: I'm sorry, sir. I believe that they have the right to do the search of the phone and that they've held off at this point from doing any search of the phone. Again, you're even complaining that they kept the phone and that your guy had to buy another phone. It was unbelievable to me that --

MR. KASSEM: No, Your Honor, we --

THE COURT: Yes, that's in your papers that he was put through such a hardship because the phone numbers that he needed were on the phone and he didn't have a place to stay and he had to pay money to get another phone. You're talking about apples and oranges here.

MR. KASSEM: Your Honor, CBP's own policy recognizes that for the agency to hold onto the device is a hardship. We're not making --

THE COURT: But it was stayed because of your request. It was stayed because of your request. So in trying to uphold your client's rights you made an agreement with the Government that they would not search the phone but you knew that they were going to hold the phone while this was being addressed.

MR. KASSEM: Your Honor, we have no -- we have no problems with them holding the phone. If Mr. Schachner had said that they were going to limit themselves to a permissible manual search then we would have talked about what that entailed and the issue would have been settled. If we're talking about a forensic search then we need to brief that issue, Your Honor. We can't simply waive it. We would not be doing our duty --

THE COURT: That's fine but I am not going to make the Government hold off on doing the search. You could brief whatever you want on whatever schedule and we can set that but this is a civil action. I do not believe that you have this as your remedy to challenge the Government's doing the search. If you believe that they violate your client's rights you can bring whatever type of request for redress you believe is appropriate but I don't believe that there's a basis for you to enjoin the Government except on their consent which they consented up until now because they thought that they would be working out with you a protocol for not invading the attorney-client privilege.

But I tried to speak about who the people on the list are and you keep wanting to argue about the difference between the full search or forensic search and the manual or the quick search, and I'm not prepared for you to hold off the Government's --

MR. KASSEM: Your Honor --

THE COURT: -- border search based on your briefing of what you believe the different standards are for those types of searches. The Court does not get involved in the border search because if the border is a different standard, which everybody recognizes that it is, can you imagine how many people would not want their privacy to be probed at the border.

So I am not giving you a new avenue. I am telling you we have the opportunity now, right here and now to limit what they're going to look at.

MR. KASSEM: Your Honor, can I suggest a way forward for --

THE COURT: Sure.

MR. KASSEM: So what I would respectfully propose, Your Honor, is that as you suggested we can discuss with opposing counsel how to cabin their search with respect to the attorney-client privilege contents of the phone. We will only do that reserving our rights to subsequently seek relief as to what we believe is an impermissible forensic search of our client's phone. As you suggested, Your Honor, we won't purport to prevent the Government from moving forward with their search as we discuss all of that but we will file our motion afterwards as to what we continue to believe is an impermissible forensic search of the phone, Your Honor. I believe --

THE COURT: Again, sir, this is what I would say. I'm not trying to string you along here. You were told to file this new case because the old case was over. I understand why it would have been better for your client to keep the old case open and bootstrap this new claim onto that case because that case even though the Government had never answered at least it was already in play. Okay. So now you have a complaint for declaratory and injunctive relief and because you're a law professor, Mr. Kassem, Professor Kassem, the jurisdiction that you're citing is 1331. So what is the congressional act that gives rise to a claim for a declaratory judgment and an injunction in the border search of an electronic device?

MR. KASSEM: Your Honor, I'm not sure I'm following at this point. What I've tried to say, Your Honor, is that --

THE COURT: I would like you to answer my question. What is the jurisdiction for somebody to challenge -- you're suing U.S. Customs and Border Protection, R. Gil Kerlikowske, Commissioner of U.S. Custom and Border Protection, Department of Homeland Security, Jeh Johnson, Secretary of U.S. Department of Homeland Security. What is it that is the basis, the arising under jurisdiction? I understand there's a Fourth Amendment claim that you want to raise but what gives the Court the jurisdiction to entertain this complaint for declaratory and injunctive relief?

MR. ISMAIL: Your Honor, I would again point the Court -- this is Tarek Ismail again. I would again point the Court to the District of Massachusetts case, House v. Napolitano where an individual's phone, camera, USB device -- and that case was in the posture that we've now suggested where the Government has had -- had done the search and the suit was then brought after the phone hadn't been returned for some time.

THE COURT: But, again, it's after the fact and it's a First Amendment challenge and it was that the search took an impermissible amount of time. So --

MR. ISMAIL: Your Honor, those -- that's not all that was brought up there. It was a First Amendment challenge. There were two Fourth Amendment claims in that case both that the search had taken too long and that the search was impermissible with respect to the invasiveness of the search, and I would add that all of these cases are happening before the recent Supreme Court case of California v. Reilly which goes in depth. I understand that that's a search incident to arrest and that that context is quite different with respect to the interests that are being protected by the Government.

But the Supreme Court does go in depth into the ways in which electronics are simply different than containers.

THE COURT: I'm so sorry, sir. Again, I am the one who gets warrant applications on a regular basis. So I do understand that the context matters and that arguing that California v. Reilly means that you have a good faith claim for declaratory and injunctive relief for your client under these circumstances again, every person who's stopped at the border would then have a good faith basis for declaratory and injunctive relief if they didn't want their phone or laptop to be searched whether it's --

MR. ISMAIL: Your Honor --

THE COURT: -- the full search or the quick search. There is an exception and again that's where we started. And I again reiterate that the border search doctrine is a special needs or administrative exception to the traditional threshold requirements requiring probable cause and reasonable suspicion.

So I would like us now to come up with a reasonable way that we could go forward in the case. I'm on the phone. I don't need it needs to be with me on the phone but I don't want it being put off to next week. Please, will you please answer my question about who these people are that are listed? If this is the complete list of all the communications that they should not look at I need to hear that. Who is --

MR. KASSEM: Yes, Your Honor --

THE COURT: Who is Hugh Handicy [Ph.]?

MR. KASSEM: Your Honor, if I may, this is Ramzi Kassem. Let me address your question before we sort of think about the next steps. We're happy, by the way, to continue the conversation with opposing counsel on this.

To answer your question, individuals that were mentioned in the original email are all covered by the attorney-client privilege. They were either members of the legal team here at Main Street Legal Services representing Mr.

Janfeshan or they were separate counsel advising Mr. Janfeshan from the American Civil Liberties Union.

THE COURT: So can you tell me who is who just so I have it?

MR. KASSEM: Of course, Your Honor. So Mr. Handicy who's listed is an attorney at the American Civil Liberties Union.

THE COURT: Thank you.

MR. KASSEM: I'm trying to pull up --

THE COURT: Kelly Bernett? I'll go down the list. Kelly Bernett is a student.

MR. KASSEM: So Kelly Bernett is a member of our legal team here at Main Street Legal Services. She's covered by the practice --

THE COURT: That's fine. I'm not contesting it. Let's just go down the list. Deala Shamas, who is Deala Shamas?

MR. KASSEM: I'll answer your question as fully as possible, Your Honor.

THE COURT: Who is Deala Shamas?

MR. KASSEM: Mr. Shamas is an attorney who was previously with Main Street Legal Services.

THE COURT: Who is Craig Small?

MR. KASSEM: Craig Small was also a member of our law firm. He's also a student attorney.

THE COURT: So those are the names that are listed.

Mr. Schachner, I haven't asked a whole lot from you but I would like there to be something in writing saying that any of the communications between Mr. Janfeshan and any of those listed people will not be opened.

MR. SCHACHNER: I'll have to get back to Your Honor about that, about how we can do that. I appreciate Your Honor's help with this. We -- just so the record is clear, we had -- we had -- I had cleared my calendar for next Wednesday morning. I had hoped we had gotten more additional information particular the specific communications that they're claiming to be privileged. That would certainly help.

THE COURT: Well, again, if I am telling you that these are the communications that should not be searched, any communication that have any of these people's name on it should not be looked at, that should be enough.

MR. SCHACHNER: Okay. What I'll do is --

THE COURT: There can be a filter team set up as there are on many other cases. Whether or not they agree to it --

MR. SCHACHNER: Yes.

THE COURT: -- or they don't agree to it and that any of these names should not be looked at.

MR. SCHACHNER: Okay. That is -- yes. CPB does have a -- at least at JFK does have a procedure for a filter team and we're prepared to utilize that procedure. In fact, we've already -- in fact, that procedure has already started and that's reflected in the email traffic that was attached to Ms. Ahmad's declaration in the earlier case. CPB in accordance with that procedure reached out and got some information about the -- some information about the claim of attorney-client privilege. I will -- we got some additional information just now. I will of course convey that --

THE COURT: It's the same information as -- it's the same information that was written in the letter to Ms. Kelly by Ms. Ahmad. This information was the information they were objecting to the filter team.

MR. SCHACHNER: Right.

THE COURT: But, again, I don't believe that they have a basis to object to the filter team. They can sue after the fact if they believe something was done impermissibly that violates their client's rights.

MR. SCHACHNER: That's fine. So we're prepared to start the search with the filter team and if Your Honor -- I guess Your Honor's instructions that the filter team look at communications involving these -- I guess it's seven individuals listed in Ms. Ahmad's email of November 29, 2016, 2:16 p.m. I don't believe that's a problem. If it is -- my only concern is for technical issues. I don't claim to be the world's biggest technology expert but if that's Your Honor's order I will convey that right away to CBP. If it becomes a problem I will contact counsel and we can contact chambers.

THE COURT: Well, again --

MR. KASSEM: Your Honor --

THE COURT: -- I understand that plaintiffs are still going to want to file papers but my ruling is that with the exception of those names that have been provided and again, it was an email from Ms. Ahmad to Ms. Kelly but mine is marked 2:17 p.m., Tuesday, November 29, 2:17 p.m. It's copied to Mr. Kassem and Mr. Ismail, Mr. Dunn, but it was sent from Ms. Ahmad to Ms. Kelly and it's attached to the Document 10 on 16-CV-4324. It's Document 10-2, Page 20 at the bottom, Page 21 is the full email listing the names. We have just heard the proffer from the plaintiffs as to who those people are and I'm satisfied that their communications would be protected based on the proffer given by Mr. Kassem and Mr. Ismail. So the filter team should not open or look at those communications.

MR. SCHACHNER: I'm sorry. The filter team should -- the filter team should not open those communications.

THE COURT: Should not open or review those communications. They are protected by the attorney-client privilege and this is to avoid further motion practice holding up the Government's search. The Government has a basis to conduct a search. I'm trying to balance the need to search against the invasion which the search entails but I am not going to continue on consent of the Government to hold the Government off from doing the border search which again this was -- this was November 20th that he arrived at JFK. The Government had on its consent held off on the border search until today.

I find that there is no further basis today since we are at December 28th to hold the Government off but I do caution the Government that there is an attorney-client privilege being asserted as to these names and if the Government wants to they are free to try to get a warrant but, again, if they don't want to try to get a warrant to look at anything on the phone that's their prerogative. It is a border search which as I've said is an exception to the traditional threshold requirements.

I will also say that if the plaintiff believes that the defendants have violated the plaintiff's rights they can bring any type of request for redress or whatever action they believe is in their client's interest but I cannot based on Mr. Janfeshan's objection to the search. I would like there to be a protocol that the parties work out. I would like there to be a protocol for when the phone might be returned. So if you want to continue to disucss those things. But I am not going to say that the Government must until the plaintiff is satisfied with the protocol must withhold on any search that it believes it's permitted to conduct because it was a border search.

MR. SCHACHNER: That's fine, Your Honor. Just to understand the protocol. We'd basically be utilizing the standard operating procedure at JFK. The only thing -- the only difference would be the filter team should not even open or even look at the communications involving those seven individuals on the page --

THE COURT: Correct.

MR. SCHACHNER: -- that you noted.

THE COURT: That's correct. I'll put -- I will put that into writing today so that, Mr. Ismail and Mr. Kassem, you can figure out what your position will be going forward.

But, again, since the prior application in the prior case which is now closed, 16-CV-4324, was not an order of the Court but on consent of the parties and because I understand that this issue has great import for both sides but I do not believe there is a basis for Mr. Janfeshan to preempt the Government's ability to conduct a search at the border of his electronic device, herein his telephone.

I am putting this on the record today. I am encouraging the parties to discuss a way going forward that the phone could be returned at a certain point in time that would be agreeable, and I will also say, Mr. Schachner, that the seven names that are listed in the email are names of attorneys or students working under attorneys' supervision that had involvement in Mr. Janfeshan's case if there are communications on that cell phone between the attorney and that -- and Mr. Janfeshan that the filter team should not open those communications or review those communications, and that if there's any need for it the Governmetn can make its application to the Court.

MR. SCHACHNER: We'll do that, Your Honor. Again, as I was saying before, I just want to confirm with CBP that if as a technical matter that can be done.

THE COURT: Again, sir, I am telling you it can be done and it should be done.

MR. SCHACHNER: Okay.

THE COURT: I oversee a lot of warrant applications. There is great technical capability on the part of the Government.

There was another issue in this case which nobody is talking about and I don't really want to touch which is whether or not Mr. Janfeshan will provide his pass code to the phone and he was told to be in a communication from Ms. Kelly that if they try to get into the phone and it destroys the phone that they will not be liable under the Federal Tort Claims Act Standards. So that notice has been given. I'm not going to touch that issue.

Was there anything else, Mr. Ismail or Mr. Kassem, that needs to be addressed on behalf of Mr. Janfeshan? And I do understand that you've made the arguments for your client, that you have not waived any of your arguments herein. Is there anything else that needs to be addressed today?

MR. KASSEM: Your Honor, this is Ramzi Kassem. We again appreciate your time and assistance with this. We will look forward to your order. We remain available -- if there are any snags and if it would be helpful to Mr. Schachner for us to get on the phone with him we're still happy to do that and we will obviously as you suggested, Your Honor, discuss with Mr. Schachner the return of the device eventually and also as you suggested, Your Honor, we will seek relief after the fact as to the part of the search, the forensic part of the search that believe is impermissible.

THE COURT: Very good. Anything further, Mr. Schachner, before we adjourn?

MR. SCHACHNER: No, Your Honor.

THE COURT: Then I will order a copy of this transcript to be made part of the record and I will put out a short order which will just detail that the Government had consented in the prior case to hold off in any border search and that is now lifted with the proviso that the seven names listed in the prior case, Ahmad, Bernett, Handisy, Ismail, Kassem, Shamas and Small, that those are communications between an attorney and a client and should be respected as such and that the Government should not open those communications or review them and that I'm directing Mr. Schachner to tell his client that whether those communications are via email, what's up, signal or text messaging, if it's between Ahmad, Burnett, Handisy, Ismail, Kassem, Shamas, Small and Mr. Janfeshan that the Government should not look at those communications or open those communications.

With that, we are adjourned. Thank you.

MR. SCHACHNER: Thank you, Your Honor.

(Proceedings concluded at 10:26 a.m.)

* * * * *

I certify that the foregoing is a court transcript from an electronic sound recording of the proceedings in the above-entitled matter.

Shari Riemer, CET-805

Dated: December 29, 2016